Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

No. 74-418

EDWIN DUBA,

Petitioner,

vs.

W. DON MC INTYRE, DONALD LISSMAN and BERNARD J. ACH,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Supreme Court of the United States

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No.....

—o—

EDWIN DUBA,

Petitioner,

vs.

W. DON MC INTYRE, DONALD LISSMAN
and BERNARD J. ACH,

Respondents.

—o—

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

—o—

For his Petition for Writ of Certiorari, petitioner shows unto the Court:

—o—

OFFICIAL AND UNOFFICIAL REPORTS

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II. *Edwin Duba v. W. Don Mc Intyre, Donald Lissman and Bernard J. Ach,* No. 73-1724, Decided July 18, 1974 (8 Cir. 1974) APPENDIX

—o—

JURISDICTION

On July 18, 1974 the United States Court of Appeals for the Eighth Circuit affirmed summary judgment by the United States District Court for the District of Nebraska, Honorable Richard E. Robinson, Judge, in which the Court dismissed an action founded upon due process and equal protection of law and 42 U. S. C. § 1983.

———o———

ISSUES FOR REVIEW

I.

Whether a City Attorney of a Second Class City who executed an Affidavit for Bench Warrant which resulted in an illegal arrest, an illegal incarceration, and an illegal attachment and sale of property, who knew or should have known that the Affidavit failed to charge the commission of an offense made criminal by the laws of Nebraska, has judicial immunity for such act in an action for damages for malicious prosecution and for violation of 42 U. S. C. § 1983.

II.

Whether a Justice of the Peace in Nebraska who issued a Bench Warrant and Order for Attachment in Aid and Execution which resulted in an illegal arrest, an illegal incarceration, and an illegal attachment and sale of property, who knew or should have known that the Affidavit in support thereof failed to charge the commission of an offense made criminal by the laws of Nebraska,

had judicial immunity for such acts in an action for damages for malicious prosecution and for violation of 42 U. S. C. § 1983.

III.

Whether a Chief of Police of a Second Class City in Nebraska who executed a Bench Warrant and an Order for Attachment in Aid and Execution which resulted in an illegal arrest, an illegal incarceration and an illegal attachment and sale of property, who knew or should have known that he had no authority of incarceration under the Bench Warrant, that the Bench Warrant was irregular on its face, and that he had no statutory authority of attachment and execution, has judicial immunity for such acts in an action for false arrest, false imprisonment, malicious prosecution and for violation of 42 U. S. C. § 1983.

IV.

Whether judicial immunity from civil liability is absolute or whether it is a qualified immunity of varying scope, the variation dependent upon the scope of discretion and responsibilities of the Judge and all the circumstances as they reasonably appeared at the time of the action upon which liability was predicated.

V.

Whether judicial immunity from civil liability is a fact question for the Court or for the jury.

CONSTITUTIONAL PROVISIONS AND STATUTES

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are

citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

U. S. Constitution, Amendment XIV, Section 1.

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress."

17 Stat. 13, 42 U. S. C. § 1983.

———o———

STATEMENT OF THE CASE

Edwin Duba, petitioner, brought this action for damages for malicious prosecution, false arrest, and violation of 42 U. S. C. § 1983 in the United States District Court for the District of Nebraska. Respondents answered, each alleging, among others, the defense of immunity. Thereafter, each filed separate motions for summary judgment on the grounds of immunity, all of which were sustained individually, and the case was dismissed by the Honorable Richard E. Robinson, Judge, without reported opinion.

At all times pertinent hereto, petitioner Edwin Duba was a resident of Saline County, Nebraska; respondent W.

Don McIntyre was the duly elected, qualified and acting Justice of the Peace for the District of Saline County, Friend, Nebraska, a second class city; respondent Donald Lissman was the duly qualified, appointed and acting Chief of Police of Friend, Nebraska; and respondent Bernard J. Ach was the City Attorney of Friend, Nebraska.

On the 11th day of September 1970 petitioner entered a plea of guilty in the Justice of the Peace Court, Friend, Nebraska to a charge of unlawfully permitting hogs to run at large upon the city streets, alleys and public grounds of the City of Friend, Nebraska on the 28th, 29th, 30th and 31st days of August 1970 in violation of an Ordinance of the City of Friend, Nebraska, for which a fine was imposed by said Court in the amount of $55.00, together with costs in the sum of $4.00. Petitioner was then released upon the condition that said fine and costs would be paid within one week.

On the 24th day of September respondent Bernard J. Ach issued and delivered an Affidavit for Bench Warrant directing and praying Duba's arrest and the attachment of all his hogs to satisfy costs and fine levied on the 11th of September and *for costs and fines in subsequent cases not yet filed.*

Petitioner alleged and respondent Ach denied that the Affidavit for Bench Warrant was issued and delivered under color of state law and without jurisdictional authority.

On the 24th day of September 1970, respondent McIntyre issued a Bench Warrant for the arrest of Duba which recited as probable cause the failure of payment of fine and costs assessed by his court and *for the failure of*

the payment of fines in subsequent cases not yet filed. Petitioner alleged and respondent McIntyre denied that the warrant was issued under color of state law and without jurisdictional authority.

On the 24th day of September, respondent McIntyre issued an Order of Attachment in Aid and Execution directing the attachment, loading, and sale in his name, all of Duba's hogs for the payment of fines and costs set out above. Petitioner alleged and respondent McIntyre denied that said order was issued under color of state law and without jurisdictional authority.

On the 24th day of September, within one hour, Duba was arrested by respondent Lissman, lodged directly in jail contrary to the order, and 110 of his hogs were attached, loaded and removed to a secret location. On September 25, 1970 the hogs were sold in McIntyre's name out of Saline County in York, Nebraska without bond, inventory or advertisement.

Duba alleged and all respondents denied that at the time of the arrest and attachment all of the respondents knew that the value of the swine greatly exceeded the fine and costs and that the arrest, imprisonment, attachment and sale of said swine constituted a willful and contumacious, malicious prosecution, false arrest, false imprisonment, and violation of petitioner's constitutional civil rights.

Petitioner's deposition shows the fair market value of the hogs to be several thousands of dollars and damages exceeding $40,000.00.

In his answer, McIntyre pled defenses of ignorance, reliance upon respondent Ach, and judicial immunity. Respondent Ach pled affirmative defenses of lack of jurisdiction of the court, statutory authority for his actions, and immunity. Respondent Lissman pled ignorance, reliance upon respondent Ach and good faith as affirmative defenses.

ARGUMENT

The Circuit Court founded its per curiam opinion on absolute judicial immunity for the Justice of the Peace, and, in turn, derivative immunity for the City Attorney and Police Chief.

Notwithstanding this court's dicta in *Pierson v. Ray*, 386 U. S. 547 (1967) to the effect that common law judicial immunity was not abrogated by 42 U. S. C. § 1983, such immunity cannot be absolute for if it is, then we no longer have a constitutional government in this country but rather a judicial dictatorship.

Fundamental due process and equal protection demand that the judiciary be not above the law in order to prevent another form of the very misuses and abuses of governmental power that this court has concerned itself with in the recent past.

It is one thing to hold that a judge shall be immune from the consequences of his good faith judicial acts and quite another to hold that a judge shall be immune from all consequences of his knowing and intentional deprivation of a person's civil rights. Judicial immunity, in order to prevent a mockery of the 14th Amendment, must of neces-

sity be a qualified immunity of varying scope, the variation dependent upon the scope of discretion and responsibilities of the judicial office and all the circumstances as they reasonably appeared at the time of the action on which liability was predicated—a fact question to be determined by the court or jury after hearing all the evidence. *Scheuer v. Rhodes*, — U. S. —, 40 L. Ed. 90, 94 S. Ct. 1683 (Nos. 72-914 and 72-1318 decided April 17, 1974).

Petitioner respectfully requests Certiorari.

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APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

Civil 71-L-317

MEMORANDUM
(Filed May 4, 1973)

EDWIN DUBA,

Plaintiff,

vs.

W. DON McINTYRE, DONALD LISSMAN,
and BERNARD J. ACH,

Defendants.

ROBINSON, Senior Judge

THIS MATTER comes before the court upon the motions for summary judgment of defendant, McIntyre (Filing No. 34), defendant Lissman (Filing No. 36) and defendant Ach (Filing No. 38).

Oral arguments have been heard and all parties were given an opportunity to present supporting or opposing evidence. Briefs have been submitted.

The court does not perceive any genuine issue as to any material fact; rather the parties disagree as to the application of the facts to the law governing this action.

The undisputed facts disclose that the plaintiff possessed and raised hogs, and on September 11th, 1970, the plaintiff appeared before Defendant McIntyre (a duly, elected, qualified and acting Justice of the Peace for the

District of Saline County, Friend, Nebraska), and entered a plea of guilty to a charge of unlawfully permitting hogs to run at large upon the city streets, alleys and public grounds in violation of an ordinance of the City of Friend, Nebraska.

Defendant McIntyre imposed a fine of $55.00 plus costs in the sum of $4.00, but the plaintiff was released upon the condition that said fine and costs were to be paid within one week. The plaintiff did not pay the fine within the time granted. Defendant, Bernard J. Ach, City Attorney for the City of Friend, Nebraska, executed an affidavit for a Bench Warrant and presented it to defendant McIntyre. On September 24th, 1970, defendant McIntyre then issued a Bench Warrant and an Order for Attachment in aid and execution. Defendant Lissman was the duly qualified, appointed, and acting Chief of Police of Friend, Nebraska. Defendant Lissman executed the Bench Warrant and Order for Attachment in Aid and Execution on September 24th, 1970, and 110 hogs were attached. On September 25th, 1970 hogs were sold in defendant McIntyre's name without bond, inventory, or advertisement. The plaintiff commenced this action pursuant to 42 U. S. C. § 1983 alleging "a willful, contumacious, and malicious false arrest, false imprisonment, wrongful attachment and execution under color of state law and a violation and deprivation of plaintiff's rights, privileges and immunities secured by the Constitution of the United States. (Plaintiff's Amended Complaint—Def. Exhibit No. 1, filing No. 24). Each of the defendants assert immunity as a defense.

The parties agree that the common law rule of Judicial Immunity from liability for damages was not abrogated

by the passage of 42 U. S. C. § 1983. See *Pierson v. Ray*, 386 U. S. 547 (1967).

The plaintiff asserts that the acts in the case were performed in the clear absence of jurisdiction and that there is thus no immunity. As stated in *Rhodes v. Houston*, 202 F. Supp. 624 (D. Neb. 1962):

> "An exception to the rule of judicial immunity exists which is founded on a distinction between *excess* of jurisdiction and the *absence* of all jurisdiction. . . . Where there is jurisdiction over the subject matter and the person there is immunity, and even though a judge acts in *excess* of his jurisdiction the immunity remains. . . . But where an act is done in the clear *absence* of all jurisdiction and this is known to the judge there is no immunity." (Citations omitted.)

Thus the issue before the Court is whether there was a clear absence of jurisdiction. If upon the agreed facts it can be determined that there was jurisdiction over the subject matter and person, then the defendants could assert immunity even though there was an *excess* of jurisdiction.

If, however, there was a clear *absence* of jurisdiction then the defendants would not be entitled to the defense of immunity.

There is no dispute as to whether there was jurisdiction over the person if there was subject matter jurisdiction, and the issue is thus narrowed as to whether there was sufficient jurisdiction over the subject matter such that the doctrine of immunity may be properly applied.

The plaintiff initially argues that there is a factual issue as to the validity of the Friend Ordinance in question. In support of the motion for summary judgment, however,

an affidavit was filed and received. (Def. Exhibit No. 7 —Filing No. 35). According to this affidavit the ordinance was in full force and effect. The plaintiff neither offered any item in rebuttal nor even advanced any specific reason or legal theory as to why the ordinance might have been defective.

As stated in *Jennings v. Davis,* No. 72-1590, (4/20/73 8th Cir.):

> "(A)pellants could not then rest upon the mere allegations of their pleadings, but should have 'set forth specific facts showing that there is a genuine issue for trial'. See Rule 56(e)."

Moreover any potential defect in the ordinance may have been waived by the plea of guilty. The lack of even a theory by the plaintiff precludes any definitive determination on the basis of waiver.

The court must look at the pertinent Nebraska law which defines the jurisdiction of a Justice of the Peace. Neb. Rev. Stat. § 27-102 (Reissue 1964) provides:

> "Justices of the peace shall have jurisdiction in all cases where the sum in question does not exceed two hundred dollars, except in cases limited in this Chapter."

Neb. Rev. Stat. 27-105 (Reissue 1964) does not limit jurisdiction in this case nor has any other limitation of Chapter 27 been noted by the court.

Neb. Rev. Stat. § 17-547 (Reissue 1970) provides:

> "Second class cities and villages shall have power to regulate the running at large of cattle, hogs, horses, mules, sheep, goats, dogs, and other animals, and to cause such as may be running at large to be impounded and sold to discharge the cost and penalties provided for the violation of such prohibitions and the expense of impounding and keeping the same and of such sale."

Friend is a second class city, and, as previously noted, an ordinance to regulate the running at large of various animals was in force.

Neb. Rev. Stat. § 17-564 (Reissue 1970) further provides a method for enforcement of city ordinances:

> "Fines may in all cases, and in addition to any other mode provided, be recovered by suit or action before a justice of the peace, or other court of competent jurisdiction, in the name of the state."

Neb. Rev. Stat. § 27-1601 (Reissue 1964) provides:

> "Execution for the enforcement of a judgment before a justice of the peace, . . . , may issue by the justice before whom the judgment was rendered . . ."

and Neb. Rev. Stat. § 27-1602 (Reissue 1964) provides:

> "It shall be the duty of the Justice, if the case is not appealed, . . . , at the expiration of ten days from the entry of the judgment, to issue execution, without a demand, and proceed to collect the judgment . . ."

Cleaver v. Jenkins, 84 Neb. 565, 121 N. W. 992 (1909), specifically cited § 1048 of the Civil Code (which is a source of Neb. Rev. Stat. § 27-1602 (Reissue 1964)) in holding that a city police judge had authority to issue executions to recover fines imposed for a violation of an ordinance. Since the statutory provision explicitly refers to justices of the peace it clearly follows that the holding of *Cleaver, supra,* would also pertain to justices of the peace.

The plaintiff argues that there is no authority to enforce the ordinance by imprisonment until the execution was returned unsatisfied.

Neb. Rev. Stat. § 29-2404 (Reissue of 1964) provides:

> "In all cases of misdemeanor in which courts or magistrates shall have power to fine any offender, and shall render judgment for such fine, it shall be lawful to issue executions for the same, with the costs taxed against the offender, to be levied on the goods and chattels of any such offender, and, for want of the same, upon the body of the offender, who shall thereupon be committed to the jail of the proper county until the fine and costs be paid, or secured to be paid, or the offender be otherwise discharged according to law."

See *State v. Swedland*, 114 Neb. 280, 207 N. W. 29 (1926).

The Bench Warrant provides in part that:

> "The defendant entered a plea of guilty and was convicted and was fined the sum of $55.00 and assessed the costs in the amount of $4.00; that the defendant was unable to pay the same; that the defendant was thereupon released upon the condition that he would pay the fine and costs within one week; that the defendant has failed, refused and neglected to pay the fine and costs; that a Bench Warrant should be issued for the defendant's arrest and for notification upon him that all hogs owned by him within the City Limits of the City of Friend would be attached, seized and sold at public auction to the highest bidder for cash in order to satisfy the fine and costs herein as well as the fine and costs in subsequent cases filed for the same offense."
>
> "These are, therefore, to command you forthwith to take the said Edwin Duba into custody and bring his body before me for entry of an order of attachment of all his hogs in the City of Friend to be sold at public auction to the highest bidder for cash in order to satisfy the unpaid fines and costs herein as well as in other subsequent cases for the same offense. (Defendant's Exhibit No. 3)."

The undisputed facts disclose that the plaintiff was taken into custody for approximately an hour and a half shortly after noon on September 24th, 1970 (Defendant's Exhibit 8—pgs. 27-29—this is labeled erroneously as "Defendant's" Exhibit but was offered only by the plaintiff and it is treated as plaintiff's exhibit).

Then defendant McIntyre (in company with defendant Lissman) arrived at the jail and the plaintiff was released.

It is clear from the language of the Bench Warrant that the purpose was to aid in the execution and attachment and not to commit the plaintiff to jail until the fine and costs were paid, and the plaintiff's own evidence confirms that the purpose was *not* to commit the plaintiff to jail until the fine and costs were paid (Defendant's (plaintiff's) Exhibit 8, pgs. 29-31). Other language relating to future fines and costs goes to an excess of jurisdiction and is superfluous with respect to this action because there is no contention that any money was held for future fines and costs.

The court finds, upon the undisputed facts, that under the pertinent Nebraska law there was jurisdiction over the subject matter, and that notwithstanding acts done in an excess of jurisdiction the defendants are entitled to assert the defense of immunity.

Under the sweeping immunity provided judges it is apparent that summary judgment should be granted for

Justice of the Peace McIntyre. See *Rhodes v. Houston*, 202 F. Supp. 624 (D. Neb. 1962).

Under the undisputed facts of this action it is clear that the defendant Ach was performing acts in connection with judicial duties (as opposed to investigatory duties) and is entitled to "quasi-judicial" immunity. See *Rhodes v. Houston, supra; Skinner v. Grimminger*, Civil No. 72-L-247 (D. Neb. 11/20/72) and *Wilhelm v. Turner*, 431 F. 2d 117 (8th Cir. 1970).

The court holds that summary judgment dismissing the action against defendant Ach is proper.

The defendants should not interpret the shield of immunity as for their protection or benefit. As stated in *Pierson v. Ray, supra*, at 554, it is

> "(F)or the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences."

In order to benefit the public fully it is important to exercise good judgment.

The court notes that the Nebraska Unicameral repealed Chapter 27 of the Neb. Rev. Statutes and abolished the Justice of the Peace Courts. See Neb. Rev. Stat. (1972 C. S.).

A separate order granting summary judgment for the defendants and dismissing this action will be entered.

Dated this 4th day of May, 1973.

Civil 71-L-817

ORDER

(Filed May 4, 1973)

THIS ACTION came on for hearing before the court and the issues having been duly heard and a Memorandum decision having been duly rendered,

IT IS ORDERED that the motions of defendant McIntyre, defendant Ach and defendant Lissman should be and are hereby granted and sustained.

IT IS FURTHER ORDERED that the plaintiff Duba take nothing, and that the action be dismissed on the merits.

Dated this 4th day of May, 1973.

BY THE COURT:
Richard E. Robinson
Senior United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

———o———

No. 73-1724

———o———

Edwin Duba,

Appellant,

vs.

W. Don McIntyre, Donald Lissman and Bernard J. Ach,

Appellees.

———o———

Appeal from the United States District Court
for the District of Nebraska.

———o———

Submitted: March 15, 1974.

———o———

Filed: July 18, 1974.

———o———

Before GIBSON, BRIGHT and STEPHENSON,
Circuit Judges.

———

PER CURIAM.

Appellant-Duba brought this damage action for malicious prosecution, false arrest, and violation of 42 U.S.C. § 1983 in the United States District Court for the District of Nebraska (Senior District Judge Richard E. Robinson, presiding). Appellees, who are officials of Friend, Nebraska—Justice of the Peace W. Don McIntyre, City Attorney Bernard J. Ach, and Chief of Police Donald Lissman—moved for summary judgment on the grounds of judicial immunity. In an unreported opinion, Judge Robinson sustained the motions and dismissed the case.

The fundament of appellant's complaint is that appellees maliciously destroyed his business and violated his constitutional rights by attaching and selling off his entire stock of hogs, valued at several thousand dollars, on the pretense of satisfying a $55 misdemeanor fine. The underlying facts appear to be that on September 11, 1970, Duba entered a plea of guilty before Justice of the Peace McIntyre on a charge of unlawfully permitting some of his hogs to run at large upon the streets of the City of Friend, Nebraska; he was released on the condition that the $55 fine plus $4 costs be paid within one week. On September 24, 1970, City Attorney Ach issued and delivered to appellee-McIntyre an affidavit for a bench warrant, directing Duba's arrest and the attachment of all of his hogs "in order to satisfy the fine and costs herein as well as the fine and costs in subsequent cases filed for the same offense." The bench warrant was issued forthwith, Duba was arrested and detained for about one hour, and 110 of his hogs were attached, loaded, and removed to an auction barn in York, Nebraska, where they were

sold the following day without bond, inventory, or advertisement.

In answer, appellees raise the defense of judicial immunity for the justice of the peace and, in turn, derivative immunity for the prosecutor and quasi-judicial immunity for the police chief. Judge Robinson concluded:

> The Court finds, upon the undisputed facts, that under the pertinent Nebraska law there was jurisdiction over the subject matter, and that notwithstanding acts done in an excess of jurisdiction the defendants are entitled to assert the defense of immunity.

The sole issue on this appeal is whether the doctrine of judicial immunity was properly invoked to shield the conduct of the appellees in this case. We hold that it was.

As the district court correctly noted, the common law rule of judicial immunity from liability for damages was not abrogated by the passage of 42 U. S. C. § 1983, *Pierson v. Ray*, 386 U. S. 547 (1967), and that immunity is absolute even though the judge may act in excess of his jurisdiction and with malice. *Id.* at 554. As a judicial officer, a justice of the peace has the benefit of this immunity. *Stift v. Lynch*, 267 F. 2d 237 (7th Cir. 1959). A derivative form of immunity exists for prosecutors who will be cloaked with the same immunity granted to judges when they are acting within the scope of their proper prosecutorial capacity, rather than in an investigatory capacity. *Barnes v. Dorsey*, 480 F. 2d 1057, 1060 (8th Cir. 1973). *See Wilhelm v. Turner*, 431 F. 2d 177 (8th Cir. 1970); *cert. denied*, 401 U. S. 947 (1971). A quasi-judicial form of immunity is extended to police and other court officers for purely ministerial acts where they do nothing other than perform orders issuing from a court. *Rhodes v. Houston*,

202 F. Supp. 624, 636 (D. Neb.), *aff'd* 309 F. 2d 959 (8th Cir. 1962) (citing cases). The question therefore is whether the appellees were acting within the scope of their jurisdiction under Nebraska law.

The leading cases which we must turn to for guidance in determining whether the complained-of acts were done in the "absence" of jurisdiction or merely in "excess" of jurisdiction are *Bradley v. Fisher*, 80 U. S. 335 (1871); *Manning v. Ketcham*, 58 F. 2d 948 (6th Cir. 1932); and *Wade v. Bethesda Hospital*, 337 F. Supp. 671 (S. D. Ohio 1971). *Cf. Jacobson v. Schaefer*, 441 F. 2d 127 (7th Cir. 1971). These cases instruct that the motivation of the judge is no test of his jurisdiction, and that malice goes only to aggravation of damages and that honesty of purpose goes only to mitigation. *Manning v. Ketcham* at 949. A useful test has been suggested in *Wade v. Bethesda Hospital*, where the court said:

> We begin by defining the concept of jurisdiction as it is used in the context of judicial immunity. The cases are clear that the term jurisdiction means that the judge must have both jurisdiction over the person and subject matter if he is to be immune from suit for an act performed in his judicial capacity. See, Thompson v. Heither, 235 F. 2d 177 (6th Cir. 1956) and cases cited therein; Ryan v. Scoggin, 245 F. 2d 54 (10th Cir. 1957). A third element, however, also enters into the concept of jurisdiction as used in this context. The third element is the power of the Court to render the particular decision which was given. See, Cooper v. Reynolds, 77 U. S. 308, 316, 10 Wall. 308, 19 L. Ed. 931 (1870); National Malleable & Steel Castings Co. v. Goodlet, 195 F. 2d 8 (7th Cir. 1952); City of Phoenix v. Greer, 43 Ariz. 214, 29 P. 2d 1062 (1934).

A judge will not lose his immunity because of a mere error in judgment even though the resultant act be in excess of the Court's jurisdiction. Ryan v. Scoggin, *supra*; O'Bryan v. Chandler, 352 F. 2d 987 (10th Cir. 1965) cert. den. 384 U. S. 926, 86 S. Ct. 1444, 16 L. Ed. 2d 530, rehearing den. 385 U. S. 889, 87 S. Ct. 13, 17 L. Ed. 2d 123. "Excess of jurisdiction" as distinguished from entire absence of jurisdiction, means that the act, although within the general power of the judge, is not authorized and therefore void, because conditions which alone authorize exercise of judicial power in the particular case are wanting and judicial power is not lawfully invoked. Pogue v. Swink, 365 Mo. 503, 284 S. W. 2d 868 (1955).

Consequently, the third element in the concept of jurisdiction as used in the context of judicial immunity necessitates an inquiry into whether the defendant's action is authorized by any set of conditions or circumstances. [337 F. Supp. at 673.]

In essence, Judge Robinson used this test to examine appellant's allegations in light of Nebraska law which clearly authorizes judicial officers including justices of the peace to issue executions to recover fines imposed for violation of municipal ordinances. *See* Neb. Rev. Stat. § 17-564 (Reissue 1970); § 27-1601 (Reissue 1964). *Cf. Cleaver v. Jenkins*, 121 N. W. 992 (Neb. 1909). Judge Robinson concluded:

> It is clear from the language of the Bench Warrant that the purpose was to aid in the execution and attachment and not to commit the plaintiff to jail until the fine and costs were paid, and the plaintiff's own evidence confirms that the purpose was *not* to commit the plaintiff to jail until the fine and costs were paid (Defendant's (plaintiff's) Exhibit 8, pgs. 29-31). Other language relating to future fines and costs goes to an excess of jurisdiction and is superfluous with respect to this action because there is no contention that any money was held for future fines and costs.

We think that Judge Robinson was correct in holding that appellees' conduct, even though in excess of their jurisdiction, was within their general powers under Nebraska law and therefore cloaked with immunity for the purpose of a civil rights action under § 1983.[1] We also approve Judge Robinson's wise *caveat* regarding judicial immunity:

> The defendants should not interpret the shield of immunity as for their protection or benefit. As stated in *Pierson v. Ray, supra*, at 554, it is
>
> "(F)or the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences."
>
> In order to benefit the public fully it is important to exercise good judgment.

See Scheuer v. Rhodes, 94 S. Ct. 1683 (1974).

Affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

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1 This opinion, limited to recognizing the applicability under § 1983 of the common law rule of immunity for the defendants in this case, offers no view on whether plaintiff would have a common law action under Nebraska law in **indebitatus assumpsit**, and possible damages against the state for the recovery back of a fine which allegedly has been illegally collected. If Nebraska recognizes such an action in **indebitatus assumpsit**, Nebraska state courts provide the proper forum.

Supreme Court, U. S.
FILED
NOV 7 1974
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Supreme Court of the United States

No. 74-418

EDWIN DUBA,

Petitioner,

vs.

W. DON McINTYRE, DONALD LISSMAN, AND BERNARD ACH,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Supreme Court of the United States

—o—

No. 74-418

—o—

EDWIN DUBA,

Petitioner.

vs.

W. DON McINTYRE, DONALD LISSMAN, AND BERNARD ACH,

Respondents.

—o—

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

—o—

ISSUES FOR REVIEW

Respondent does not accept the issues as set forth in petitioner's brief. The questions are more correctly stated in respondent Lissman's brief in the Court of Appeals, to-wit:

Whether

> "Arrest, imprisonment and execution of an order of attachment in aid and execution by a chief of police pursuant to a judicial directive is well within the authority of Nebraska statutes."

and whether

"A chief of police who performs his official duties pursuant to law is entitled to judicial immunity from suit."

———o———

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Respondent Donald Lissman takes exception to the citation by Petitioner of U. S. Constitution Amendment XIV, Sec. 1 in its brief for the reason that said section was neither cited nor relied upon in either his U. S. District Court or Eighth Circuit Court of Appeals brief.

———o———

STATEMENT OF THE CASE

Respondent Donald Lissman does not accept petitioner's Statement of the Case. Respondent Lissman submits that the more correct Statement of the Case is as follows:

This action was brought by the petitioner, Edwin Duba, for damages arising out of an alleged false arrest, false imprisonment, unlawful attachment, unlawful execution and violation of his civil rights under 42 U. S. C. 1983. The case was filed in the United States District Court for the District of Nebraska, jurisdiction based on 28 U. S. C., Sec. 1343 and 42 U. S. C., Sec. 1983. Donald Lissman, among other respondents, filed a motion for summary judgment based on the fact that there was no genuine issue as to any material fact and that respondent Lissman was entitled to a judgment as a matter of law.

The Honorable Richard E. Robinson sustained respondent Lissman's motion for summary judgment on the basis of judicial immunity and the case was dismissed. The petitioner then processed his appeal pursuant to 28 U. S. C., Section 1292.

On the 11th day of September 1970 petitioner entered a plea of guilty in the Justice of the Peace Court, Friend, Nebraska, to a charge of unlawfully permitting hogs to run at large upon the city streets, alleys and public grounds of the City of Friend, Nebraska, on the 28th, 29th, 30th and 31st days of August, 1970, in violation of an Ordinance of the City of Friend, Nebraska, for which a fine was imposed by said Court in the amount of $55.00, together with costs in the sum of $4.00. Petitioner was then released upon the condition that said fine and costs would be paid within one week.

On the 24th day of September, 1970, respondent Ach, the duly appointed and acting City Attorney of Friend, Nebraska, executed an Affidavit for Bench Warrant, and delivered it to the respondent, W. Don McIntyre, the duly elected, qualified and acting Justice of the Peace for the District of Saline, Friend, Nebraska.

The respondent, W. Don McIntyre, on September 24, 1970, issued a Bench Warrant, and delivered it to the respondent, Donald Lissman, the qualified, appointed and acting Chief of Police of Friend, Nebraska. Also on September 24, 1970 the respondent McIntyre executed and delivered to the respondent Lissman an Order of Attachment in Aid and Execution.

On September 24, 1970, the respondent Donald Lissman arrested the petitioner, Edwin Duba, and placed him

in jail for about one (1) hour, and attached certain swine in which the petitioner had an interest and said swine were sold at a public auction on September 25, 1970. The petitioner's fine was satisfied out of the proceeds of the sale and the excess proceeds were delivered to the rightful owner of the swine.

The petitioner brought this action against the respondent, Donald Lissman and the other respondents for their part in enforcing the fine levied against the petitioner on September 11, 1970.

ARGUMENT

I.

Those Courts of Appeal which have decided the issues presented in this case have decided them favorably to the respondent, Donald Lissman.

One of the considerations governing review on certiorari is whether "a Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals on the same matter * * *."[1] In the case now before the Court respondent Lissman finds no conflicting decisions in the Courts of Appeal and petitioner cites none. Four Courts of Appeal have determined the immunity issue and have held uniformly in conformance with the Eighth Circuit Court of Appeals. The Circuit Court decisions are:

1 Rules of the Supreme Court of the United States.

Fourth Circuit—*Steinpreis v. Shook*, 377 F. 2d 282 (4th Cir.), Cert. Denied 389 U. S. 1057 (1967).

Second Circuit—*Ravenscroft v. Casey*, 139 F. 2d 776 (2nd Cir. 1944), Cert. Denied 323 U. S. 745 (1944).

Sixth Circuit—*Allen v. Groap*, 283 F. 2d 692 (6th Cir. 1960).

Eighth Circuit—*Duba v. McIntyre, et al.*, — F. 2d — (March 15, 1974, No. 73-1724).

The Circuit Court in *Steinpreis v. Shook, supra,* in dismissing the suit against a county sheriff for wrongfully, fraudulently and maliciously obtaining judgments, and evicting the plaintiffs from a farm which they had leased, stated:

> "Likewise, the County Sheriff, in levying distraints, serving summonses, and conducting a Sheriff's sale, was merely carrying out the routine functions of his office. *These duties are mandatory.* * * * *All of the papers which the Sheriff processed were on standard forms and under oath. There is no allegation that the Sheriff made any improper or false return in any of these papers."* At 283, 284. (Emphasis added.)

The Second and Sixth Circuits have held that authorities performing orders issuing from a Court are provided immunity when they do nothing other than perform those orders. *Ravenscroft v. Casey, supra,* and *Allen v. Groap, supra.*

Within the Circuits which have not decided the issue now before the Court, the District Courts considering the question have uniformly followed the Circuit Court decisions. The Federal District Court for the District of Nebraska, in *Rhodes v. Houston*, 202 F. Supp. 624 (D. Neb. 1962) stated as follows:

"An exception to the rule of judicial immunity exists which is founded on a distinction between the *excess* of jurisdiction and the *absence* of all jurisdictions * * * Where there is jurisdiction over the subject matter and the person there is immunity, and even though a judge acts in *excess* of his jurisdiction the immunity remains. * * * But where an act is done in the clear *absence* of all jurisdiction and this is known to the judge there is no immunity." (Citations omitted.)

Appellant presented no evidence to show that the City Ordinance or the Nebraska Statutes relied upon by respondents herein were defective or not in full force and effect. The Courts below determined, we think correctly, that there was sufficient jurisdiction over the subject matter so as to protect the respondent's actions under the Doctrine of Judicial Immunity.

The Federal District Court of Nebraska determined the issue of liability of police officers under 42 U. S. C. A., Section 1983, in *Rhodes v. Houston, supra,* and decided in favor of the police officer. In this case the plaintiff was tried in absentia for contempt of Court and was fined $2,500.00 and sentenced to nine months of hard labor in the Nebraska Penitentiary. The Clerk of the District Court, acting under color of her office and without a mittimus or other direction of the Court, issued an order of commitment directed to the County Sheriff to execute a sentence. Plaintiff subsequently filed suit against the District Judge, the Clerk of the Court, the prosecuting attorney, the Sheriff, and the Prison Warden. Judge Van Pelt, speaking for the Nebraska Court, dismissed the plaintiff's action against all defendants. Judge Van Pelt extensively discusses the immunity of judges, the immunity of prosecuting attorneys, the immunity of wardens and penal institution employees, and the immunity of law enforcement officers. With reference to the immunity of police officers, Judge Van Pelt stated:

"Authorities performing orders issuing from a Court are provided immunity when they do nothing other than perform such orders. Citing *Ravenscroft v. Casey,* 138 F. 2d 776 (2nd Cir. 1944), Cert. Denied 323 U. S. 745 (1944). See also *Thompson v. Baker,* 133 F. Supp. 247 (Western District Arkansas, 1955); *Allen v. Group,* 283 F. 2d 692 (6th Cir. 1960). Supra at 636.

"(All actions of defendants Houston, Linch, and Knudtson (police officers) and defendant Macken (County Attorney) may be added, or allegedly performed on the authority of the commitment issued by the defendant Schuetz. On the strength of the authority set out above, it appears that these defendants are immune from the claim which plaintiff attempts to assert in his first cause of action.) (Parenthesis added.) Supra at 636."

The common law rule of judicial immunity has not been altered or abrogated by the passage of the Civil Rights Act, 42 U. S. C., Section 1981, et seq.; *Pierson v. Ray,* 386 U. S. 547, 87 S. Ct. 1213 (1967).

Other Federal Courts have held that a police officer executing a valid court order receives the same immunity which a judge acquires as a defense for his judicial actions. An example of this doctrine can be found in the case of *Goodwin v. Williams, et al.,* 293 F. Supp. 770 (1968). The action was filed under 42 U. S. C. A., Section 1983, for willful and malicious conspiracy to deny plaintiff of his constitutional rights. A trial court judge had issued a warrant for plaintiff's arrest, and had set the peace bond at $20,000.00. The Texas court dismissed the complaint with prejudice and held:

"It appears that the acts complained of as to the defendant Sharp were acts that he performed in his capacity as Sheriff of Deaf Smith County, Texas, and in the performance of his duty under the orders of the County Judge of that County. *The defendant Sharp as Sheriff was not only acting officially as Sheriff, but he was in effect an instrumentality of the County Court in carrying out the judicial functions and orders of that County Court.*" (Emphasis added.)

"The County Judge has an immunity in this case that prevents any cause of action by the plaintiff here. Further, this immunity would, in this particular case, apply to the defendant Sharp, as Sheriff, because he was an arm of the County Court in carrying out the judicial functions of that Court as well as acting in his capacity as Sheriff. At 771-772."

The Supreme Court of the State of Nebraska has touched on the issue of the immunity of police officers and constables and have decided in favor of those ministerial officers. *Henning v. City of Hebron*, 186 Neb. 381, 183 N. W. 2d 756 (1971); *Atwood v. Atwater*, 43 Neb. 147, 61 N. W. 574 (1895); *Kelsey v. Klabunde*, 54 Neb. 760, 74 N. W. 1099 (1898).

Clearly the Circuit Court decisions support the decision of the Eighth Circuit Court of Appeals in the instant case. Respondent Lissman respectfully submits therefore that a review by this Court is unnecessary to resolve a conflict between subordinate courts and jurisdictions.

II.

The decision of the Eighth Circuit Court of Appeals is correct and consistent with prior U. S. Supreme Court decisions on the issue presented.

The United States Supreme Court, in *Pierson v. Ray*, *supra*, in discussing the immunity doctrine, stated with regard to the potential liability of the judges as follows:

> "We do not believe that this settled principle of law was abolished by Section 1983 which makes liable 'every person' who under color of law deprives another person of his civil rights. The legislative records gives no clear indication that Congress meant to abolish wholesale all common law immunities. * * * Immunity of judges for acts within the judicial rule is equally well established, and we presume that Congress would have specifically so provided had it wished to abolish the doctrine."

In discussing the liability of the policemen, the court said:

> "We hold that the defense of good faith and probable cause, which the Court of Appeals found available to the officers in the common law action for false arrest and imprisonment is also available to them in the action under Section 1983. At 557.
>
> "A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does. At 555."

The *Pierson* case set forth the doctrine that trial court judges are absolutely immune from civil liabilities from any actions performed under their jurisdiction, and likewise any police officers performing their duties in good faith and with probable cause shall not be subject to any civil liability.

The only U. S. Supreme Court case cited by petitioner is *Scheuer v. Rhodes*, — U. S. —, 40 L. Ed. 90, 94 S. Ct. 1683 (Nos. 72-914 and 72-1318 decided April 17, 1974). In the *Scheuer* case, *supra*, the Federal District

Court and the Court of Appeals for the Third Circuit agreed that the suit in question in legal effect was one against the State of Ohio and therefore not maintainable under the 11th Amendment and alternatively, that the common law doctrine of executive immunity barred the complainant's action. The complaints were dismissed at the District Court level for lack of jurisdiction and no answers were apparently filed on behalf of the defendants.

This Court reversed the judgment of the Court of Appeals and remanded for further proceedings either by way of summary judgment or by trial on the merits.

The major distinction between the *Scheuer* case and the case at bar is that the latter involved motions for summary judgment based on the pleadings, the deposition and affidavits and a factual determination was made by the District Court and affirmed by the Eighth Circuit Court of Appeals.

The deficiency in the *Scheuer* case, i. e., lack of factual findings, is not present in the case at bar. The issue before the Supreme Court in *Scheuer* was not whether judicial immunity applied but whether the claimant should be entitled to offer evidence to support the claims. This Court determined that further proceedings either by way of summary judgment or by trial on the merits are required in the *Scheuer* case and should be judicially resolved.

Respondent Donald Lissman respectfully submits to the Court that the issue of immunity as to him was resolved by the Federal District Court for the District of Nebraska and by the Eighth Circuit Court of Appeals and

that this Court is not compelled to further review the matter.

The *Scheuer* case does provide, aside from the narrow issue presented to it, a rather exhaustive review of the law of immunity and cites with approval and quotes from its earlier decision rendered in *Pierson v. Ray, supra.*

CONCLUSION

For the foregoing reasons, respondent Lissman respectfully requests that the Petition for Writ of Certiorari be denied in this case and that the decision of the United States Court of Appeals for the Eighth Circuit be allowed to stand.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-418

EDWIN DUBA,

Petitioner,

vs.

W. DON McINTYRE, DONALD LISSMAN and BERNARD J. ACH

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT BERNARD J. ACH IN OPPOSITION

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BRIEF FOR RESPONDENT BERNARD J. ACH IN OPPOSITION

OPINIONS BELOW

I. The opinion of the District Court for the District of Nebraska, Honorable Richard E. Robinson, Judge; Unreported opinion (App. of Petition).

II. The opinion of the Court of Appeals for the Eighth Circuit No. 73-1724, July 18, 1974 (App. of Petition).

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on July 18, 1974. The petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U. S. C., § 1254 (1).

QUESTION PRESENTED

Whether judicial immunity applies to a City Attorney who prepared an Affidavit for a Bench Warrant in an attempt to effectuate the collection of a lawful fine which had not been paid, in an action brought against the City Attorney for malicious prosecution and violation of 42 U. S. C., § 1983.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent provisions of the United States Constitution (U. S. Const. amend. XIV, section 1) and the U. S. Statutes involved (17 Stat. 13, 42 U. S. C., section 1983) are set forth in the Petition at pages 3 and 4. The following statute is also relevant:

> Execution for the enforcement of a judgment before a justice of the peace, except where it has been taken to the district court on appeal, or docketed therein, or during the time it may be stayed, as provided by this article, may issue by the justice before whom the judgment was rendered, or by his successor in office on the application of the party entitled thereto, at any time within five years of entry of the judgment, or the date of the last execution issued thereon. Neb. Rev. Stat. § 27-1061 (Reissue 1964).

STATEMENT

This action was brought by the petitioner, Edwin Duba, for damages arising out of an alleged malicious prosecution, false arrest and violation of his civil rights under 42 U. S. C., § 1983. The case was filed in the United States District Court for the District of Nebraska, jurisdiction based on U. S. C., § 1343 and 42 U. S. C., § 1983. Bernard Ach, filed an answer alleging among other defenses the defense of judicial immunity. Mr. Ach, as well as the other respondents, filed a motion for summary judgment based on the fact that there was no genuine issue as to any material fact and that the respondent was entitled to a judgment as a matter of law. The motions for summary judgment, of all the respondents, were sustained, and the case dismissed, by the Honorable Richard E. Robinson, without a reported opinion. (App. p. 9 of Petition)

The Court of Appeals affirmed the judgment of the District Court. (App. p. 18 of Petition)

On the 11th day of September, 1970, petitioner entered a plea of guilty in the Justice of the Peace Court, Friend, Nebraska, to a charge of unlawfully permitting hogs to run at large upon the city streets, alleys and public grounds of the City of Friend, Nebraska, for which a fine was imposed by said Court in the amount of $55.00, together with costs in the sum of $4.00. Petitioner was then released upon the condition that said fine and costs would be paid within one week.

On the 24th day of September, respondent, Bernard J. Ach, the duly appointed and acting City Attorney of Friend, Nebraska, executed an Affidavit for Bench Warrant and delivered it to the respondent, W. Don McIntyre, the duly elected, qualified and acting Justice of the Peace for the District of Saline County, Friend, Nebraska.

The respondent, W. Don McIntyre, on September 24, 1970, issued a Bench Warrant and delivered it to the respondent, Donald Lissman, the qualified, appointed, and acting Chief of Police of Friend, Nebraska. Also on September 24, respondent McIntyre executed and de-

livered to the respondent, Lissman, an Order of Attachment in Aid and Execution.

On September 24, 1970, the respondent, Lissman, arrested the plaintiff, Edwin Duba, and placed him in jail for about 1 hour, and attached certain swine in which the petitioner had an interest, and said swine were sold at a public auction on September 25, 1970. The petitioner's fine was satisfied out of the proceeds of the sale and the excess proceeds were delivered to the rightful owner of the swine.

The petitioner brought this action against the respondent, Bernard J. Ach, and the other respondents for their parts in enforcing the fine levied against the petitioner on September 11, 1970.

ARGUMENT

The United States Court for the District of Nebraska carefully considered all of the petitioner's arguments in light of the undisputed facts. It is clear that the execution of the Bench Warrant and delivery to the Justice of the Peace was within the duties of the City Attorney. Neb. Rev. Stat., § 27-1601 (Reissue 1964) The District Court found, that under pertinent Nebraska law, there was jurisdiction over the subject matter and over the person, and that the respondent, Bernard J. Ach, was entitled to the defense of judicial immunity. (App. p. 15-16 of Petition)

The District Court did not grant summary judgment to the respondent on the basis of a totally unqualified immunity as indicated by the petitioner. The fact that the District Court did not adopt this theory is evident from its opinion. The District Court and the Circuit

Court applied the clear *absence* of jurisdiction verses the *excess* of jurisdiction test. (App. p. 11 & 21 of Petition)

There is an unanimity among other lower courts in upholding the applicability of judicial immunity to prosecuters acting within their prosecutorial capacity. *Bauers v. Heisel*, 361 F. 2d 581 (3rd Cir. 1966); *Wilhelm v. Turner*, 431 F. 2d 177 (8th Cir. 1970); *cert. denied*, 401 U. S. 947 (1971). The application of the *absence* of jurisdiction versus the *excess* of jurisdiction test is also unanimously applied among the various circuits. (See cases cited App. p. 21 of Petition) The petitioner does not allege that there is a conflict of decisions among the lower courts nor does he cite any pending litigation or give any indication that the general rule of immunity as applied in this case is a violation of due process or equal protection.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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